Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-952

INMOBILIARIA MELIA DE PUERTO RICO, INC.,
Petitioner,

against

PAINE, WEBBER, JACKSON & CURTIS, INCORPORATED,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 7, 1977

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Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 543 F.2d 3 (2d Cir. 1976).

Statute and Rules Involved

The petition involves a consideration of Rules 37(b)(2) and 53(c) and (e) of the Federal Rules of Civil Procedure and 28 U.S.C.A. § 636(b). Rule 37(b)(2) appears in Appendix E of the petition. Rule 53(c) and (e) and 28 U.S.C.A. § 636(b) are reprinted in Appendix D of this brief.

Questions Presented

1. Did the court of appeals correctly hold that it was not an abuse of discretion for the district court to apply the sanctions provided in Rule 37 of the Federal Rules of Civil Procedure where, despite a number of outstanding district court orders to do so, petitioner

(a) had repeatedly and willfully failed to appear for a deposition; and

(b) had also willfully failed to produce documents requested by respondent or, in lieu thereof, affidavits attesting to the nonexistence of such documents?

2. Can the question of the district court's power to review the magistrate's recommendations properly be raised for the first time before this Court?

3. Did the district court retain full powers of review over the magistrate's recommendations?

Statement of the Case

A. Nature of the Case

This action arose out of a brokerage agreement between respondent and petitioner wherein petitioner appointed respondent its sole and exclusive agent to secure financing for the construction of a condominium hotel, termed an "Apartotel", in Puerto Rico. (JA 8-14)* The contract also provided for the payment to respondent of a brokerage fee of 1½ percent of the amount of any loan commitment delivered to and/or accepted by the petitioner. Through the services of an independent broker and while the exclusive agency contract with respondent was in full force and effect, petitioner obtained financing from a lender earlier contacted by respondent on petitioner's behalf. (JA 57; EV 93-97, 99, 167-69; Pet. 10)

As a result of respondent's breach of the contract, on May 31, 1973, respondent sued to recover the commission fee in the amount of $285,000. (JA 5-14) Petitioner does not deny that the financing was obtained through another broker, nor does it dispute the provisions of the contract itself. By its amended answer, however, dated April 8, 1975 and served nearly two years after this action commenced, petitioner asserted counterclaims seeking damages

* "JA" refers to the Joint Appendix and "EV" refers to the Exhibit Volume, both of which petitioner has requested be transmitted to this Court; "Pet." refers to the petition.

in the amount of $1,500,000 for a delay that allegedly occurred as a result of respondent's efforts in seeking financing for the petitioner. (JA 15-16) The lack of merit of petitioner's counterclaims is revealed by a review of the record, which establishes that any delay occurred largely as a result of petitioner's failure to provide adequate guarantees for a multimillion dollar loan and to supply adequate supporting data to First Mortgage Investors Trust, a potential lender contacted by respondent. (EV 40-43, 396-99, 411-13, 510-11, 531-34)

Moreover, under the law governing the contract, petitioner is liable for the brokerage fee as a result of the nature of the exclusive agency created, respondent's efforts in securing financing, petitioner's conduct impeding those efforts and its use of another broker while the contract with respondent was in effect. That respondent's claim is meritorious is further evidenced by petitioner's continued failure, for more than two years, to appear for its deposition and to provide relevant corporate records. In fact, by its default, petitioner has admitted every well-pleaded allegation in respondent's complaint and reply to the counterclaims.*

In any event, petitioner's reliance on the purported merits of its claim and its belated attack on that of respondent to excuse its contumacious behavior is totally misplaced. At this juncture, where both the district court and the court of appeals found petitioner's failure to comply with outstanding discovery orders willful and deserving of the severest of sanctions, any reference to the underlying claim is wholly collateral.** Petitioner had numerous opportunities to test the merits of its claim by complying with the court's discovery orders and expeditiously pro-

* *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322, 351 (1909).

** *See Trans World Airlines, Inc.* v. *Hughes*, 449 F.2d 51, 63-64 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973).

ceeding to trial. It is now simply too late for petitioner to seek to avoid liability by challenging the validity of respondent's claim.

B. Proceedings in the District Court

1. *Respondent's First Motion for Sanctions and the District Court's Order of March 5, 1974.*

After the filing of petitioner's answer on July 30, 1973 (JA 15-16), respondent noticed the depositions of petitioner by Martin L. Cohen, Jack Berger and Pedro Fullana, the three principal figures in petitioner's operations,* for November 1, 1973 in New York, and also served notice pursuant to Fed. R. Civ. P. 34 that certain documents be produced by petitioner by October 25, 1973.** (JA 20-22, 24-25) None of the requested materials were forthcoming on that date.

* Cohen owns or controls approximately 50 percent of petitioner's stock and is a director and president of petitioner. (EV 9-10) Berger was a director and senior financial officer of the Melia Organization, which owns approximately three-eighths of the stock of petitioner. (JA 63; EV 204-05) Fullana controls one-eighth of the stock of petitioner, is its executive vice-president and is in charge of its operations in Puerto Rico. (JA 56, 63, 244; EV 215, 452)

** Plaintiff's Notice to Produce requested, *inter alia:*

> 2. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication, occurring from January 1, 1971 to date with Paine, Webber or any broker other than Paine, Webber in connection with any financing or proposed financing of the construction of the Apartotel.
>
> 3. All documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication, occurring from January 1, 1971 to date concerning any loan made or proposed to be made, by Housing Investment Corp., Inc. or The Chase Manhattan Bank, N.A. to you in connection with the construction of the Apartotel or the actual or proposed employment of any broker in connection with such loan.
>
> 4. Any other documents which reflect or refer or relate to any negotiation, discussion, agreement, understanding or communication occurring from January 1, 1971 to date between you and any other person, concerning the financing of the construction of the Apartotel. (JA 21-22)

On October 29, 1973, attorneys for the parties agreed that the documents would be produced "as soon as possible, hopefully prior to November 16" and that the depositions of Cohen and Berger would take place on December 4, 1973. In addition, the deposition of respondent by Leonard Wilkes, head of respondent's national mortgage department, was rescheduled for November 21, 1973. (JA 39)

Wilkes' deposition, the only discovery petitioner has ever sought in this action, proceeded as scheduled on November 21, 1973. (EV 354 *et seq*) At that time, noting that all that had been thus far produced were basically the "attorneys' files," which did not include the bulk of the documents requested, respondent's attorney again requested from Richard F. Horowitz, Esq., petitioner's attorney, the production of petitioner's documents. (EV 356-57) Mr. Horowitz conceded that "there is no question that I have not produced all the documents that you have requested." (EV 357)

Despite this concession, no further documents had been produced by December 3, 1973 and, in response to telephone requests, Mr. Horowitz informed respondent's attorneys that he was still unable to comply with the production request. In addition, he stated that neither Cohen nor Berger would appear, as previously scheduled, for their depositions the next day and that the depositions could not be held until the end of January 1974 at the earliest. (JA 31-32, 41)

On December 18, 1973, respondent served its first motion for an order for sanctions pursuant to Fed. R. Civ. P. 37. (JA 28-39) Petitioner filed an affidavit in response in which Mr. Horowitz conceded that petitioner was under an obligation to produce its officers, directors and managing agents for depositions and that the "propriety" of respondent's notice for production of documents had never been ques-

tioned. Petitioner further indicated that it had no objection to the court fixing dates for the depositions "at the very end of January or at any time thereafter" and committed itself to producing the remainder of the requested documents "in late January or early February." (JA 40-42)

The motion was assigned to Magistrate Schreiber for a hearing and report and, on February 22, 1974, at his suggestion and subject to the district court's approval, the parties entered into a stipulation which included a discovery schedule for depositions and document production. The stipulation provided that all future pre-trial discovery proceedings would be referred to Magistrate Schreiber for supervision; that the documents sought by the respondent's pending request for document production would be produced on or before February 26, 1974; that the Cohen and Berger depositions would be held on February 28, 1974 and March 5, 1974, respectively; and that the Fullana deposition would be deferred *sine die*. The district court modified the stipulation to schedule the Fullana deposition on April 17, 1974. As modified, the discovery schedule became the district court's order, dated February 26, 1974 and filed on March 5, 1974. (JA 44-45)*

Contrary to petitioner's suggestion (Pet. 13), by entering into the stipulation the parties had not "extended" the scope of the district court's referral to the magistrate beyond the mere supervision of discovery proceedings. Nor was there a reference under Fed. R. Civ. P. 53 or even a hint that the parties considered the magistrate's role in the proceeding to be that of a master acting under Rule 53, as the petitioner now contends for the first time before this Court.

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* Petitioner has included in the Joint Appendix only the stipulation as presented to, but not as modified by, the district court. (JA 44-45) The district court's order including the modification is part of the record in this case (JA 2) and a copy is included in Appendix A of this brief.

That the district court retained full review powers under the stipulation is confirmed by the court's modification of the stipulation with respect to the scheduling of the Fullana deposition for April 17, 1974. Moreover, petitioner's assertion, now made for the first time, that the modification was a "calendar control device" (Pet. 14) is without an iota of support in the record. To the contrary, the court's supervision over discovery was express notice to the petitioner that the action was one in which discovery was to proceed expeditiously and that the case was one in which the district court was taking an active interest.

2. *Importance of the Fullana Deposition and the Requested Documents.*

The Cohen and Berger depositions were held as scheduled but, as of February 26, 1974, only a few additional documents were produced by the petitioner. Although the petitioner was engaged in the construction of a multimillion dollar Apartotel and had its principals located in New York, Puerto Rico and Spain, it produced *no* correspondence among the principals concerning any aspect of the financing of the Apartotel project, *no* agreement with the broker who eventually arranged the financing (although he received $170,000 for his efforts), *no* minutes of its board of directors meetings at which the project was discussed, and none of the other relevant documentation one would expect of such a major transaction.

During the course of the Cohen and Berger depositions, it became apparent that petitioner had made little effort whatsoever to comply with either respondent's document requests or the district court's March 5, 1974 order and that the additional documents called for by respondent's notice did indeed exist and had not yet been produced. Notably, Cohen testified that Fullana's files had not been searched,

and Berger stated that his own files had never been examined. (EV 12, 258-59). Thus, the district court's finding of petitioner's willful failure to produce such documents was amply supported by the record even as early as March 1974.

At the Berger and Cohen depositions, petitioner was again specifically requested to make the necessary searches and to produce the requested documents. (EV 12-14, 81-82, 97, 206) In addition—and contrary to petitioner's assertion (Pet. 14, 24)—at those depositions, the vital importance of Fullana to the petitioner's operations and, consequently, of his deposition to the respondent became readily apparent. Cohen and Berger's denials of knowledge in certain key areas belie petitioner's assertion that the Fullana deposition would have been repetitious and unnecessary.* Furthermore, Cohen's and Berger's testimony corroborated the testimony of respondent's mortgage broker concerning Fullana's crucial importance to the financing of the Apartotel and his primary role in all

* Cohen's deposition testimony revealed that Fullana had initiated the discussions concerning construction of the Apartotel (EV 6-7); that Fullana had custody of the minutes of the board of directors meetings (EV 12); that it was Fullana's and Berger's decision to initially approach respondent (EV 22); that Fullana "instituted most of the attempts at getting financing", contacted HIC (the ultimate source of petitioner's financing), and conducted the negotiations with HIC and the independent broker (EV 16, 22, 89, 101); that the "ultimate financing was the result of Mr. Fullana's efforts" (EV 16-17); that Cohen did not know whether Fullana had ever entered into a written agreement with a broker other than respondent (EV 19-20); and that Fullana executed the agreement with HIC on behalf of petitioner and was a guarantor of the loan. (EV 12, 146-48).

Berger testified that Fullana was "masterminding" the petitioner's operations in Puerto Rico and that he (Berger) had no independent knowledge of the Apartotel (EV 215); that Melia (the Spanish corporate shareholder of petitioner and Berger's employer) was "putting [its] ball into Mr. Cohen's and Mr. Fullana's hands . . ." (EV 248); and that Fullana executed a supplemental financing agreement with HIC on behalf of petitioner. (EV 315-19)

aspects of the financing arrangements. (EV 362-63, 383, 411-12)

3. *Petitioner's Belated Motion to Change the Location of the Fullana Deposition.*

By April 8, 1974, none of the requested documents had been produced and, in a letter of that same date, respondent's attorneys reminded Mr. Horowitz of his client's failure to produce and of the Fullana deposition scheduled by court order for April 17, 1974. (JA 168) On April 12, 1974, more than six months after the deposition had been noticed for New York, more than one month after the district court's order and just five days before the deposition was to have occurred, petitioner served motion papers seeking an order directing that the Fullana deposition be held in Puerto Rico rather than in New York. Petitioner also sought an order allowing it to amend its answer to assert counterclaims and transferring the action to the District of Puerto Rico. (JA 46-58)

The timing of the motion suggests that it was merely a device to further delay the deposition. Significantly, the motion again confirmed the importance of Fullana's deposition. In a sworn affidavit submitted in support of the motion, Cohen stated that "Mr. Fullana will be a significant witness because, at least at the outset, he had most of the dealings with [respondent] and also because of his familiarity with the construction site involved in this litigation." (JA 56) It is undisputed that, notwithstanding the court's order of March 5, 1974, Fullana failed to appear for his deposition on April 17th.

4. *The Orders of November 11 and December 18, 1974.*

By letter dated June 26, 1974, respondent again requested completion of the document production, which remained

unaffected by petitioner's pending motions. (JA 169) The request was renewed in a telephone conversation with petitioner's attorney on August 16, 1974. (JA 148) In response, on October 21, 1974, petitioner's counsel wrote that neither his firm nor Berger had any further documents to produce. (JA 170) No mention was made about whether Cohen or Fullana or any other officers or employees of petitioner had any documents. Thus, petitioner's assertion that "it was ultimately made clear that there were no such documents" (Pet. 5n) is simply false.

As a result of petitioner's latest refusal to produce documents, respondent requested a conference with Magistrate Schreiber which was held on November 6, 1974. Magistrate Schreiber refused to believe that the requested documents did not exist, and the conference resulted in a second discovery order, filed on November 11, 1974, which required that the documents requested in respondent's Rule 34 notice and those specifically requested during the Cohen and Berger depositions be produced "on or before December 15, 1974", failing which it was recommended that "[petitioner's] answer be stricken and judgment be entered for [respondent]". (JA 171-72) The November 11th order, which gave petitioner express notice of the risk of a default judgment for continued failure to produce the documents, expressly refutes petitioner's contention that the default judgment subsequently entered was unexpected. Moreover, implicit in the order was a finding that petitioner had willfully failed to produce documents which should have been readily available and were clearly relevant to the litigation.

On December 16, 1974, petitioner produced three envelopes filled entirely with Cohen's personal and business travel and telephone bills and receipts, predominantly addressed to a Cohen family corporation unrelated to petitioner, as well as some other correspondence with travel

companies concerning disputed bills. (JA 149) Except for these records, petitioner has produced fewer than thirty documents, the great majority of which was correspondence between respondent and petitioner. And still, no documents from Fullana have been produced other than a few produced from Puerto Rico during the Berger deposition. (See EV 301)

At respondent's request, yet another conference was held with Magistrate Schreiber on December 18, 1974. The result was a third discovery order directing petitioner's counsel to supply affidavits by the petitioner's principals indicating respondent's document requests had been complied with fully. (JA 150, 192) To this date, these affidavits have never been produced nor have additional documents been forthcoming.

5. *Respondent's Second Motion for Sanctions.*

On March 31, 1975, the district court denied petitioner's motion to transfer the Fullana deposition to Puerto Rico, leaving in full effect its March 5, 1974 order requiring Fullana's appearance at his deposition. Thereafter, the parties agreed that the deposition would be held on April 23, 1975, but, on April 22, 1975, Mr. Horowitz informed respondent's attorneys that Fullana would not appear. (JA 150) After further attempts to fix a date, Mr. Horowitz indicated that he had been unable to contact Fullana and the deposition has never been held. (JA 150-51)

It soon became clear that the petitioner's failure to obey court orders was not the fault of its counsel, but, rather, was entirely of its own doing. On June 3, 1975, petitioner's counsel moved for leave to withdraw as counsel of record conceding that "[s]ignificant additional discovery is required before the matter will be ready for trial" and that "[w]e have been unable to obtain the necessary coopera-

tion from the client that is required for us to do a professional and competent job of representing the [petitioner] in this case." (JA 137-41) Respondent opposed the motion on the ground that the relief sought would create further delay and cross-moved for a default judgment on the ground that petitioner had continually failed to appear for its deposition and produce documents or affidavits in lieu thereof. (JA 142-72)

On September 3, 1975, the motion was referred by the district court to Magistrate Schreiber for a hearing and report. By letter dated October 3, 1975, the district court informed the parties that all pre-trial procedures were to be completed by December 1, 1975, with a trial date to be scheduled for some time after April 1, 1976, and that the court would decide any substantive motions. (JA 179-81) This was yet another indication that the court would countenance no further delays, intended to remain directly involved and, consequently, would be the final arbiter of all pre-trial disputes, including the pending motions.

Seeking to afford petitioner yet another opportunity to comply with the court's orders, at a conference on December 1, 1975, Magistrate Schreiber said he favored a "last chance" discovery schedule and directed counsel for respondent to prepare a proposed discovery order which he would forward to the court as his recommended order. (JA 191-93) The magistrate's recommendation was submitted for the district court's consideration along with both parties' motion papers.* At no time did respondent suggest that it no longer sought a default judgment.

* The motion papers included, *inter alia*, a detailed affidavit outlining the entire procedural history of the case as well as respondent's earlier motion for sanctions, dated December 17, 1973. (JA 144-52, 153-58) Other exhibits before the court included the original notice of deposition (JA 159-60); the original Rule 34 notice, dated Sep-

(footnote continued on p. 13)

Petitioner's claim that the magistrate's recommended order "contained an implicit finding as to [petitioner's] good faith" (Pet. 3, 12) is entirely baseless. As is clear from the order itself, the magistrate found that petitioner "has failed to comply with this Court's orders insofar as they direct the production of documents or affidavits in lieu thereof and the appearance of [petitioner] for its oral examination by Mr. Fullana." (JA 192) Nothing in that recommended order even remotely suggests that the magistrate found that petitioner had been proceeding with discovery in good faith. Furthermore, petitioner's continued failure to produce documents or affidavits and to appear for its deposition by Fullana, even after the district court's order of October 3, 1975 which required completion of pre-trial discovery by December 1, 1975, points out the inaccuracy of petitioner's assertions that it had been engaged in "good faith" efforts to comply with its discovery obligations.

6. *The Default Judgment.*

On January 12, 1976, the district court rejected Magistrate Schreiber's proposed order, granted respondent's cross-motion and ordered the entry of a default judgment. (JA 173; Pet. B-1) In view of the court's continued active interest in the case, its prior refusal, where necessary, to

(footnote continued from p. 12)

tember 25, 1973 (JA 161-63); a letter from petitioner's attorney agreeing to the Cohen and Berger depositions on December 4, 1973 and promising the requested documents "hopefully prior to November 16" (JA 164); petitioner's affidavit in opposition to respondent's first motion for sanctions (JA 165-67); respondent's letters, dated April 8, 1974 and June 26, 1974, requesting documents (JA 168, 169); petitioner's letter of October 21, 1974 confirming that petitioner's attorney had "no further documents to produce" (JA 170); and Magistrate Schreiber's order, dated November 8, 1974, recommending the imposition of sanctions should the petitioner fail to meet the ordered discovery schedule. (JA 171-72)

accept without modification the recommendation of the magistrate, its order of October 3, 1975, and the magistrate's recommendation concerning default in his November 11, 1974 order, petitioner's contention that the court's action was without warning or notice and was to everyone's surprise (Pet. 18) is unfounded. Furthermore, although the court rejected the magistrate's proposed "last chance" opportunity for petitioner, it did not reject the magistrate's findings. Indeed, the court premised its order upon those findings and determined that nearly two years of willful noncompliance with court orders mandated entry of a default judgment.

Petitioner filed a motion to vacate the district court's order and for entry of the order proposed by Magistrate Schreiber. (JA 194-211) On January 21, 1976, a hearing was held before the district court at which the court denied petitioner's motion. Petitioner's claim that the district court was unfamiliar with the facts of the case and failed to consider the entire record is belied by the transcript of that hearing. The hearing minutes are replete with indications that the court was familiar with and had considered the entire record in making its determination. (JA 228, 231, 232-33, 235) Moreover, as was true when the court first considered the magistrate's proposed order, the court had before it petitioner's counsel's motion for leave to withdraw and respondent's cross-motion for sanctions, including all the exhibits to respondent's cross-motion. (See p. 12n *supra*)

Although petitioner had ample opportunity at the hearing to expand or clarify the record, when directly asked by the court to account for Fullana's failure to appear for his deposition, petitioner not only failed to offer any excuses, but also explicitly denied that any such excuses would be

forthcoming.* (JA 228-31; Pet. C-12-15) Furthermore, the excuse now offered by the petitioner to explain its failure to produce affidavits in lieu of documents, *viz.*, the court's default ruling of January 12, 1976 "deflected" petitioner's attorney from producing the affidavits of compliance "which they would otherwise have filed" (Pet. 18), ignores the fact that such production was ordered on December 18, 1974, more than one year before the court's entry of the judgment.**

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* The following are characteristic exchanges:

> "The Court: Let me ask you this: What accounts for your client's failure to appear previously for his deposition, prior to the Magistrate's proposed order—that is, as to Mr. Fullana? What accounts for his failure to appear for more than a year? I gather he was notified sometime in December or September—
>
> Mr. Horowitz: I made a motion to withdraw as counsel in this case, and the reason I made that motion was that I had not been getting cooperation from my client, especially from Mr. Fullana. I don't think, in view of the confidence of attorney-client, that I should comment any further than I have in the motion papers." (JA 228; Pet. C-12-13)
>
> * * *
>
> "Mr. Horowitz: Your Honor, I am not here to attempt to justify Mr. Fullana's failure to appear between March of 1975 and the date of the conference before the Magistrate.
>
> The Court: We are here because I am concerned with it. If you don't want to justify it, you don't have to, but that is why we are here, to determine whether a default judgment ought to be entered against your client, and, as far as I can see, the record is clear that your client wilfully failed to appear for his deposition, and that is why a default judgment is going to be entered against him, notwithstanding the recommendation of the Magistrate, because I disagree with it, that he is entitled to a second chance." (JA 231; Pet. C-14-15)

** Although petitioner's attorney refers both in the hearing transcript and in the petition to January 15, 1976 (JA 223; Pet. 19n, C-9), the date on which the affidavits would have *again* been required pursuant to Magistrate Schreiber's recommended order of December 9, 1975, in fact, petitioner was in default since December 18, 1974 in supplying those affidavits. Thus, petitioner is simply wrong when he states that the affidavits were not due until January 15, 1976. (Pet. 19n)

On January 22, 1976, the court's order and default judgment were filed. (JA 238-40) The court also awarded respondent reasonable expenses, including attorney's fees, in the amount of $3,743.50. (JA 240) Petitioner appealed to the United States Court of Appeals for the Second Circuit and, on October 12, 1976, the court of appeals unanimously affirmed the judgment, holding:

> "The record here, as indicated in the statement of facts, fully supports the finding that Fullana had willfully failed to appear for his deposition for more than seven months. Moreover, the corporate records sought here appear to be pertinent to the litigation and would normally be expected to be readily obtainable. The failure ever to produce them or by affidavit to account for their nonproduction again compels the conclusion that the District Judge did not abuse her discretion in applying the sanctions described." 543 F.2d at 6; (Pet. A-6).

ARGUMENT

I

The Court Below Correctly Applied This Court's Opinion in *National Hockey League* and, Therefore, No Adequate Reason Is Presented for Granting the Petition.

Rule 37(b)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> "If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> • • •

> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

In *National Hockey League* v. *Metropolitan Hockey Club*, 96 S. Ct. 2778 (1976), this Court has recently reaffirmed the standard of review of questions involving Rule 37 sanctions:

> "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." 96 S. Ct. at 2780.

The court below, citing its prior decisions in *Flaks* v. *Koegel*, 504 F.2d 702 (2d Cir. 1974) and *Trans World Airlines, Inc.* v. *Hughes*, 332 F.2d 602 (2d Cir. 1964), *rev'd on other grounds*, 409 U.S. 363 (1973), applied precisely this standard. After full consideration of the record, the court of appeals held that the record clearly demonstrated that petitioner had willfully failed to appear for its deposition by Fullana, its executive vice-president, and had failed to produce pertinent documents or affidavits in lieu thereof. Accordingly, the court of appeals held that the district court acted within its discretion in entering a default judgment against petitioner. As a further basis for its affirmance of the district court's action, the court of appeals quoted this Court's opinion in *National Hockey League*:

> "[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." 543 F.2d at 6; (Pet. A-6).

The determination in the courts below was almost entirely factual and the petitioner is merely seeking another factual review by this Court. After a detailed review of the record, however, the court of appeals found ample support for the district court's finding of a willful failure by petitioner to comply with outstanding discovery orders, and that decision should not be disturbed. There is no point in any further review of the decision below, which was merely a routine application of this Court's recent decision in the *National Hockey League* case.

II

The Recommended Order of the Magistrate Did Not Come Within the Purview of Fed. R. Civ. P. 53 and Is Not a Proper Issue For This Court to Consider.

Point II of the petition purports to raise a question concerning the standard of review to be used by a district court in reviewing a magistrate's findings which come within the purview of Rule 53 of the Federal Rules of Civil Procedure. This question is not proper for review by this Court in this case because it was not presented to or decided by the court of appeals. As shown by the "Index" and "Issues Presented" sections of petitioner's brief submitted to the court of appeals (which are reprinted in Appendices B and C of this brief), petitioner never raised any Rule 53 issues below. Nor is any reference to Rule 53 found in petitioner's affidavit in support of its motion to vacate the default judgment which was submitted to the district court. (See JA 194-211)

This Court has stated that it "sits as a Court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are

reviewed." *Duignan* v. *United States,* 274 U.S. 195, 200 (1927). The petitioner cites no exceptional circumstances in this case which warrant this Court's deviation from that principle of review.

Aside from the question of the propriety of review of petitioner's Point II, the record confirms that there never was a reference in this case which came within the purview of Rule 53. This rule provides for reference to a master who is, *inter alia,* to report on particular issues or perform particular acts as detailed in an order of reference. Fed. R. Civ. P. 53(c). If the order requires the master to make findings of fact and conclusions of law, he is to set them forth in his report. Fed. R. Civ. P. 53(e)(1). Section (b)(1) of 28 U.S.C.A. § 636 (Supp. 1976), the jurisdictional statute for magistrates, authorizes a district court to appoint a magistrate to act in the capacity of "a special master . . . pursuant to the . . . Federal Rules of Civl Procedure." However, it is clear in this case that the magistrate acted pursuant to 28 U.S.C.A. § 636(b)(2), which authorizes a magistrate to assist "a district judge in the conduct of pretrial or discovery proceedings" in civil actions and which is entirely distinct from a reference to a master.

In this case, the magistrate was only to supervise pretrial discovery and was not specifically required to make findings of fact or conclusions of law in his report. In addition, the parties as well as the magistrate were aware that the district court would treat the magistrate's report only as a recommendation, as evidenced by the court's action in scheduling the Fullana deposition for April 17, 1974 and the court's October 3, 1975 letter informing the parties that the court would decide all substantive motions, which, of course, included respondent's motion. (JA 179-81)

Petitioner's only basis for contending that there was a Rule 53 reference is the parties' stipulation, dated February 22, 1974, which stated that "all future pre-trial discovery proceedings shall be referred to Magistrate Sol Schreiber for supervision." (JA 44; Pet. 25) Relying upon *DeCosta* v. *Columbia Broadcasting System, Inc.*, 520 F.2d 499 (1st Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976), petitioner claims that as a result of the stipulation, the magistrate's findings were subject to reversal only if clearly erroneous. In *DeCosta*, however, the entire case was referred to a magistrate "for hearing and determination." 520 F.2d at 502. The distinction between that reference and one of discovery proceedings for supervision makes petitioner's reliance on *DeCosta* untenable.

Moreover, petitioner's position before this Court is directly contrary to that which it took at the January 21, 1976 hearing before the district court. At the hearing, the following discourse occurred:

> "The Court: Are you suggesting the Court is bound by the report of the Magistrate?
>
> Mr. Horowitz: I would not presume to suggest that, your Honor. I appreciate that the Court has discretion to accept or to reject or to modify the recommendations of the Magistrate and I am in the process of suggesting to the Court reasons why I think that the Court would want to accept the recommendation of the Magistrate." (JA 219-20; Pet. C-7)

Thus, consistent with the stipulation, the parties have always recognized that the district judge remained free to accept, reject or modify the magistrate's reports, and petitioner has presented no evidence which suggests otherwise. Petitioner's Point II is without any legal or factual merit and is totally inappropriate for review by this Court in this case.

Conclusion

No questions raised in the petition make Supreme Court review appropriate, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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New York, New York 10005
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Of Counsel:

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD

February 7, 1977

APPENDICES

APPENDIX A
The District Court's Order of March 5, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Conformed Copy
U. S. District Court
Filed
MAR. 5 1974
S. D. of N. Y.

PAINE, WEBBER, JACKSON & CURTIS INCORPORATED,

Plaintiff,

-against-

INMOBILIARIA MELIA DE PUERTO RICO, INC.,

Defendant.

73 Civ. 2422 (CBM)

STIPULATION

It is hereby stipulated and agreed by and between the undersigned counsel for the parties to this action that:

1. All future pre-trial discovery proceedings shall be referred to Magistrate Sol Schreiber for supervision.

2. The pending motion of plaintiff to compel discovery or impose sanctions is resolved as follows:

a. The documents whose production was sought by plaintiff's pending request for production of documents shall be produced on or before February 26, 1974 at a place to be agreed upon by counsel;

b. The oral examinations pursuant to Federal Rule of Civil Procedure 30 of Messrs. Cohen and Berger will be taken at the offices of counsel for plaintiff on February 28, 1974 at 10:00 a.m., and on March 5, 1974 at 9:30 a.m., respectively; and

c. The oral examination pursuant to Federal Rule of Civil Procedure 30 of Mr. Fullana is deferred CBM ~~direction~~ until April 17, 1974

Dated: New York, New York
February 22, 1974

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

By _____
A Member of the Firm

Attorneys for Plaintiff
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New York, New York 10005
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WEISS, ROSENTHAL, HELLER & SCHWARTZMAN

By Richard Horowitz
A Member of the Firm

Attorneys for Defendant
295 Madison Avenue
New York, New York 10017
Tel. No. (212) 725-9200

SO ORDERED: February 26, 1974

/s/ Constance Baker Motley
U.S.D.J.

MG

APPENDIX B

"Index" from Petitioner's Brief to the United States Court of Appeals for the Second Circuit

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TABLE OF AUTHORITIES

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APPENDIX C

"Issues Presented" in Petitioner's Brief to the United States Court of Appeals for the Second Circuit

Was it error and/or an abuse of discretion for the District Court, because of alleged non-compliance with certain discovery demands, to have directed entry of the default judgment against defendant on January 12, 1976 and to have dismissed defendant's counterclaims pursuant to plaintiff's Cross Motion of June 20, 1975:

> 1. Where testimony and documents adduced in already extensive pre-trial proceedings suggest both that plaintiff was not, in fact, the procuring cause of the loan ultimately obtained and could not, therefore, have prevailed on the merits in its claim for a mortgage placement brokerage fee, and that defendant's counterclaims, based upon serious factual misrepresentations by plaintiffs, are valid and substantial;
>
> 2. Where a stipulation of the parties referring "all future pre-trial discovery proceedings" to Magistrate Sol Schreiber "for supervision" had enabled plaintiff to press forward with discovery demands which would otherwise have been held in limbo for the period of a year during which the District Court kept *sub judice* a motion by defendant to transfer the action to the District of Puerto Rico;
>
> 3. Where the same stipulation which permitted plaintiff to press its discovery demands while defendant's transfer motion was *sub judice,* also mandated a denial or withdrawal of plaintiff's Cross Motion as moot or as having been waived, since further proceedings were had pursuant to such stipulation and a discovery schedule established thereunder by Magistrate Schreiber;

4. Where the aforesaid discovery schedule had been incorporated into an order agreed to and prepared by plaintiff and adopted, with minor revision, by Magistrate Schreiber, and defendant was in process of complying therewith, the remaining deposition witness, Pedro Fullana, having flown to New York City from Puerto Rico, in order to do so;

5. Where defendant's then attorney, had proferred [sic], and but for the timing of the default decision, would have provided an affidavit stating that none of the remaining documents sought by plaintiff existed or could be located, so that the proposed production of Pedro Fullana for a deposition in New York would have represented full compliance with the final discovery schedule agreed upon by the parties and embodied in the order of Magistrate Schreiber;

6. Where the District Court's order rejecting Magistrate Schreiber's discovery order and schedule and granting plaintiff's six months old Cross Motion was issued without prior notice or warning to defendant and ignored the waiver and abandonment of such Cross Motion implicit in plaintiff's subsequent agreement before Magistrate Schreiber to a discovery schedule;

7. Where plaintiff's discovery was already extensive and complete enough to suggest that the deposition of Pedro Fullana, for lack of which the default issued, was not essential to the prosecution of plaintiff's case; and

8. Where defendant had moved to have the final deposition conducted in Puerto Rico, where Mr. Fullana resided, and such motion should properly have been granted under the circumstances.

APPENDIX D

Federal Rule of Civil Procedure 53

MASTERS

• • •

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

• • •

(e) Report.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and

conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissable as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

Section 636 of Title 28 of the United States Code Annotated

§ 636. Jurisdiction, powers, and temporary assignment

• • •

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

• • •